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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SECOND GENERATION, INC.,

Plaintiff and Respondent,

v.

CONG TY TNHH ANH CHAU
COMPANY, et al.,

Defendants and Appellants.

B289774

(Los Angeles County
Super. Ct. No. BC609405)

APPEAL from a judgment of the Superior Court for Los Angeles County, Frederick C. Shaller, Judge. Affirmed.

Law Offices of Philip Kaufler and Philip Kaufler for Defendants and Appellants Cong Ty TNHH Anh Chau Company, as successor in interest to Kody Branch of California, Inc.; Kody Brand, Inc.; Trinh Vuong Garment Co. Ltd.; and Seven Bros. Enterprises, Inc.

Fredman Lieberman Pearl and Howard S. Fredman for Defendant and Appellant Catherine Trinh.

Ritholz Levy Fields and David H. Boren; Stubbs Alderton & Markiles, Celina C. Kirchner and Daniel A. Rozansky for Plaintiff and Respondent.

Defendants Cong Ty TNHH Anh Chau Company, as successor in interest to Kody Branch of California, Inc. (Kody California),¹ Kody Brand, Inc. (KBI), Trinh Vuong Garment Co. Ltd. (TVG), Seven Bros Enterprises, Inc. (Seven Bros), and Catherine Trinh (Cathy)² appeal from a judgment in favor of Second Generation, Inc. (SecGen) entered after the trial court granted SecGen's motion for summary adjudication of its breach of contract claim. SecGen was awarded over \$2 million as liquidated damages, plus prejudgment interest, costs, and attorney fees, against defendants jointly and severally. Defendants contend the trial court erred in granting summary adjudication because there were triable issues of fact as to whether the liquidated damages clause in the

¹ Kody Branch of California, Inc. filed for bankruptcy after the trial court entered judgment in this case, but this appeal was not stayed. A week before oral argument in this appeal, the bankruptcy court entered an order authorizing the sale of the bankruptcy estate's rights, titles, standing, and interests in this appeal to Cong Ty TNHH Anh Chau Company. We received a certified copy of the bankruptcy court's order and granted counsel's oral motion to substitute that company into this case as successor in interest to Kody Branch of California, Inc.

² In this opinion, we refer to Kody California, KBI, TVG, and Seven Bros collectively as the entity defendants. We refer to all defendants collectively as defendants. Because this case involves other members of the Trinh family and entities owned by members of the family, we refer to family members using their first names for ease of understanding; we refer to Catherine Trinh as Cathy, which is how the parties generally referred to her.

alleged contract was unreasonable and therefore unenforceable, and whether defendants could be held jointly liable as a single enterprise or alter egos. We conclude the undisputed evidence established that the liquidated damages provision was reasonable and that defendants operated as a single enterprise with regard to their relationship with SecGen and thus are jointly liable on the contract.

BACKGROUND

Our discussion of the facts regarding SecGen's business and its relationship with defendants is taken from the evidence filed in support of SecGen's motion for summary adjudication. All of the facts below were not disputed by defendants in their opposition to the motion.

A. *SecGen's Business*

SecGen is an apparel design, sale, and wholesale distribution company that specializes in junior clothing. It sells its clothing to retail stores throughout North America and Europe.

Clothing intended for the junior segment of the apparel industry tends to be trendy, with a very limited shelf life. Items are slotted to be on the selling floor for only one season, which lasts for a maximum of 10 to 12 weeks. Therefore, most of SecGen's customers are very sensitive to delays in delivery of the products they order. Late shipments of goods not only damage SecGen's reputation for reliability (resulting in loss of future business), they also are subject to discount (because the retailers cannot sell the goods at the regular price later in the season) or cancellation of orders.

SecGen contracts with outside vendors to manufacture the goods it sells to retailers. When SecGen has a product or products to be manufactured, it issues a purchase order (PO) to a vendor. The PO sets forth the specific terms such as price, quantity, style, and the date by which the goods being ordered must be delivered to SecGen's warehouse in California. Once the goods are completed, SecGen receives an invoice from the vendor, and makes payment as directed.

All vendors with whom SecGen does business must be approved, and all approved vendors must sign its vendor agreement. The vendor agreement (which is entitled "Vendor Guide") contains a "code of conduct" intended "to ensure that [SecGen] products are produced under safe, lawful, humane and ethical conditions." It also includes a page setting forth "additional terms and conditions," which include the liquidated damages provision at issue in this case. That provision states, in relevant part: **"7. DELAY IN DELIVERY. SELLER AGREES TO NOTIFY BUYER IN WRITING WITHIN A REASONABLE TIME OF ANY UNFORESEEABLE CAUSES BEYOND ITS CONTROL WHICH HAVE OR MAY DELAY DELIVERIES AS SPECIFIED. BUYER SHALL HAVE SOLE DISCRETION TO ACCEPT ANY LATE DELIVERY. BECAUSE THE PARTIES AGREE THAT DAMAGES WOULD BE IMPRACTICABLE OR EXTREMELY DIFFICULT TO CALCULATE AS A RESULT OF SELLERS LATE DELIVERY BUYER MAY CHARGE BACK SELLER AT THE RATE OF 2% PER DAY OF THE CONTRACT PRICE FOR THE LATE GOODS, OR \$2,000.00, WHICHEVER AMOUNT IS GREATER[,] AS LIQUIDATED DAMAGES AND NOT AS PENALTY.**

THIS LIQUIDATED DAMAGES SUM REPRESENTS THE RESULT OF A REASONABLE ENDEAVOR BY THE PARTIES TO ESTIMATE A FAIR AVERAGE COMPENSATION FOR THE LOSS THAT MAY BE SUSTAINED BY BUYER AS A RESULT OF LATE DELIVERY BY SELLERS.”

Every PO SecGen issues includes the following language: “TERMS AND CONDITIONS OF 2ND GENERATION MASTER PURCHASE ORDER ARE INCORPORATED HEREIN BY REFERENCE. IF YOU NEED A COPY OF THE MASTER AGREEMENT PLEASE CALL.” Although this provision uses the terms “master purchase order” and “master agreement,” SecGen contends those terms refer to the Vendor Guide (which SecGen refers to as the “Vendor Agreement”). Defendants did not dispute in their opposition to the motion for summary adjudication that the provision referred to the Vendor Guide.

B. SecGen’s Relationship With Defendants

In March 2008, Cathy signed the vendor agreement on behalf of “Kody Brand,” listing her title as controller.³ During one of her first meetings with Michael Weisberg (Michael),⁴ the Chief Executive Officer of SecGen, Cathy explained that KBI, Kody California, TVG, and Seven

³ The signature page states: “This page must be completed and signed by **Owner or an authorized Officer** of Vendor.”

⁴ We refer to Michael and his brother Gregg (the Chief Operating Officer of SecGen) by their first names for ease of reference.

Bros were part of a large conglomerate of clothing and garment manufacturers and supply companies that operate factories in Vietnam and the United States, and that each of the companies was owned, controlled, and operated by the Trinh family. Cathy said that she worked for all of the entity defendants and was able to conduct business for all of them.

From March 2008 to October 2008, SecGen issued POs to “Kody Brand, Inc.” Beginning in November 2008, Cathy directed SecGen to issue the POs to Seven Bros instead of “Kody Brand, Inc.”⁵ Then, in January 2013, she instructed SecGen to issue all POs once again to “Kody Brand, Inc.” The POs issued to “Kody Brand, Inc.” were emailed to Cathy, who would print them and give them to her brother, Tony Trinh (Tony), at Kody California. Tony understood that even though the POs were issued to “Kody Brand, Inc.” they were intended for Kody California. When Tony received the POs, he would forward them to TVG in Vietnam.

Some of the invoices SecGen received that related to the POs issued to “Kody Brand, Inc.” came from Kody California. Others came from TVG, and still others came from Seven Bros. Cathy would instruct SecGen as to which entity the payment on each invoice should be made (regardless of who issued the invoice).

⁵ Unbeknownst to SecGen, KBI filed a certificate of dissolution with the California Secretary of State a few months after Cathy signed the vendor agreement; the certificate had been signed by David Viet Trinh (Cathy’s father) a few months before Cathy signed the agreement. “Kody Brand” became the dba for Kody California.

From 2008 through late 2014, SecGen and defendants generally had a positive business relationship. Occasionally there were late deliveries of goods, for which SecGen took charge-backs in accordance with the delay in delivery provision of the vendor agreement, and defendants accepted those charge-backs. The issues that led to the present dispute began in 2015.

1. *The 2015 Season Orders*

In late 2014, SecGen received a large order from a new retailer account, for items to be sold for the Spring 2015 season. After being reassured by Cathy that the entity defendants could deliver the goods on time (which Michael told Cathy was essential), Michael placed a substantial majority of the POs for that large order with “Kody Brand, Inc.” At around the same time, SecGen placed other large POs with “Kody Brand, Inc.” (for other retail customers), such that by December 2014, the work-in-progress under POs SecGen issued to “Kody Brand, Inc.” totaled approximately one million units, and would lead to over \$5 million in transactions with the entity defendants. This represented a substantial increase in the historical amount of business that SecGen had given to defendants.

Because of this large volume of business, Michael and Gregg traveled to Ho Chi Minh City in mid-December 2014 to confirm that all of the POs that SecGen had placed with “Kody Brand, Inc.” would be processed and delivered on time. Michael and Gregg met with Cathy and her family, who repeatedly stated that all deliveries would be made on time.

By December 30, 2014, when samples of production had not arrived for goods that were almost due to be delivered, Michael again requested confirmation that all goods would be timely delivered. He received no response for over a week; when the response came, it provided very little information. Michael subsequently learned that some of the goods that were supposed to have been received at SecGen's warehouse by the end of December had not even been shipped out of Vietnam by early January 2015.⁶ SecGen received no notice that arrival of the goods would be delayed.

On January 16, 2015, just before a large shipment of goods was supposed to be delivered to SecGen, Cathy informed Michael that there would be significant delays in fulfilling SecGen's orders for over 140,000 units. Cathy admitted to him that "Kody" incorrectly estimated its capacity to take on the amount of business it did, and had accepted far more orders than it had the capacity to produce in a timely fashion. In February and March 2015, as the delays continued, Cathy told Michael that "Kody's factory" (i.e., TVG) was still at over-capacity and could not keep up with the demand. In fact, from December 2014 through April 2015, the entity defendants routinely delivered goods between 30 and 45 days late, and as much as 87 days late.

In April 2015, after suffering unsustainable monetary losses caused by late deliveries on its POs, SecGen assessed a charge-back from the entity defendants to compensate SecGen for the losses it had

⁶ Goods shipped by vessel from Ho Chi Minh City take a minimum of 25 days to reach Southern California.

suffered related to the 2015 season orders. The amount of the charge-back—\$365,548.64—was significantly less than that allowed under the vendor agreement; rather than assessing two percent per day of delay, as allowed under the vendor agreement, SecGen assessed a per unit charge for each PO in which goods were delivered late.⁷ After subtracting the charge-back, SecGen paid the entity defendants approximately \$4.4 million in connection with the 2015 season orders.

2. The 2016 Season Orders

Although Cathy complained about and challenged the charge-back from the 2015 season orders, in July 2015, she solicited business from SecGen for the 2016 season. After Cathy promised Michael that “Kody” would deliver all goods on time, SecGen issued 56 POs to “Kody Brand, Inc.” between August and November 2015, for delivery primarily through January 2016.

In November and December 2015, Michael had numerous conversations with Cathy expressing his concerns about continuing delivery issues. He informed her that if she could not ensure timely delivery, SecGen would cancel its pending POs with “Kody Brand, Inc.” and place them with other vendors. Cathy and other principals from

⁷ How the amount of the charge-back was computed was explained to Cathy by Gregg in response to an email Cathy sent to him (from her “Kody Brand” email account) in which she complained about the charge-back amount. Had SecGen used the liquidated damages formula provided in the vendor agreement, the amount of the charge-back would have been \$2,147,352.25.

the entity defendants told Michael that the POs would be timely delivered, and begged him not to cancel the orders.

On December 4, 2015, Michael and Gregg received an email from Tai Nguyen, Senior Financial Manager at TVG, complaining about the 2015 season charge-back and demanding that SecGen “return the incorrect deduction \$365k to us next week.” Michael responded to Nguyen and the others who had been copied on the email (including Cathy at her Seven Bros email address)—whom he referred to as the “Kody Team”—informing them that given the tone of Nguyen’s email and Cathy’s failure to answer his urgent phone calls, he could not trust that they would produce SecGen’s recent orders in good faith or in a timely manner, and he cancelled several POs.

Cathy came to Michael’s office that same day, and begged him not to cancel the POs, promising to deliver all of the goods on time. Six days later, Cathy emailed Michael, forwarding Tai Nguyen’s email asking her to confirm with Michael and Gregg that SecGen would pay back \$310,000. Michael told Cathy that SecGen would not be paying that money back, and asked her to confirm that they were working on SecGen’s work-in-progress and that it would arrive on time; Cathy (using her Seven Bros email account) responded, “We take care of all your production as always.”

January 15, 2016 was the due date for several deliveries of goods; none were delivered. On January 22, 2016, “Kody” notified SecGen that it had received a shipment of approximately \$305,000 worth of goods to one of its Los Angeles warehouses, but that it intended to refuse delivery to SecGen until SecGen reimbursed it for all “charge backs”

SecGen had assessed against it. “Kody” also informed SecGen that it would not complete production and delivery of approximately \$500,000 in additional pending orders unless SecGen agreed to pay “cash before delivery.” At that time, SecGen had timely paid in full for all goods that were delivered on POs issued after August 2015, and had 52 outstanding POs.

SecGen filed the instant lawsuit on February 5, 2016, after which some of the withheld goods were delivered to SecGen. Under the formula set forth in the vendor agreement, the amount of liquidated damages that could be assessed for the late-delivered 2016 season orders was \$301,179.75.

C. *The Lawsuit*⁸

SecGen filed the instant lawsuit against Kody California, KBI, TVG, and Cathy, alleging claims for breach of contract, tortious interference with contract, intentional interference with prospective economic advantage, fraud, and negligent misrepresentation. It subsequently amended the complaint to add Seven Bros as a defendant, and later filed a second amended complaint alleging the same claims (the operative complaint) after Kody California’s demurrer was

⁸ Although the record contains numerous documents related to various motions or applications filed during the pendency of the lawsuit, most are not material to the issues on appeal. Therefore, we limit our discussion of the procedural aspects of the lawsuit primarily to the motion for summary adjudication.

sustained in part, and its motion to strike was granted in part, with leave to amend.

Kody California filed a cross-complaint against SecGen, alleging claims for breach of contract and common counts based upon SecGen's alleged failure to pay for certain goods and for air freight. Kody California sought a total of \$564,907.81. It subsequently filed an amended cross-complaint alleging the same claims and seeking the same sum.

1. *Motion for Summary Adjudication*

SecGen brought a motion for summary adjudication of its breach of contract cause of action against defendants. It argued that it was entitled to recover liquidated damages in the amount of \$2,147,352.25, less the \$365,548.64 that SecGen had already taken as a charge-back, for late deliveries made under POs issued to "Kody Brand, Inc." for the 2015 season, plus \$301,179.75 for late deliveries made under POs for the 2016 season. It also argued that all defendants were liable on the breach of contract claim because they all are part of a single enterprise and/or are alter egos of each other.

To support its claim of entitlement to liquidated damages, SecGen submitted the vendor agreement, as well as declarations and other evidence regarding the timing of deliveries and the calculation of the amounts owed.⁹ It also submitted evidence to support its assertion that

⁹ The evidence regarding the timing of the deliveries and the amounts owed as liquidated damages was provided mostly in the form of summaries and schedules prepared by SecGen's chief financial officer. Although

the liquidated damages provision was based upon damages that SecGen reasonably expected to incur at the time the contract was entered into. That evidence included documents SecGen received from some of its large customers showing that those customers would assess charge-backs on SecGen in the amount of one or two percent per day on orders that were shipped late.

To support its argument that defendants are all part of a single enterprise and/or are alter egos of each other, SecGen submitted, among other things, declarations and documents showing that although SecGen issued POs to “Kody Brand, Inc.,” defendants proceeded as though all of the entity defendants were interchangeable. For example, Joseph Souza, the chief financial officer of SecGen submitted a declaration to which he attached a schedule tracing a sampling of 15 POs issued to “Kody Brand, Inc.” between 2014 and 2016. The schedule shows that, in response to those 15 POs, SecGen received pack list documentation from Seven Bros (six times) and TVG (nine times). SecGen subsequently received invoices referencing those POs from Kody California (nine times), TVG (one time), and Seven Bros (five times), and was instructed by Cathy to pay Kody California (one time), TVG (eight times), and Seven Bros (six times). SecGen also submitted the declaration of Caroline Rocky, the principal and co-founder of Wild Horses Apparel, LLC, who described similar circumstances; between

defendants objected to these summaries and schedules, the trial court declined to consider their objections because they did not comply with the Rules of Court. Defendants do not challenge in their appellants’ opening briefs the court’s ruling with regard to its objections.

2013 and 2016, her company issued POs to “Kody Brand, Inc.” and commonly would receive invoices from other entities, such as Seven Bros or Kody California, on those POs, and would be instructed to make payment to other entities, including Seven Bros and TVG.

In addition, SecGen submitted evidence showing that Cathy sent, received, and replied to emails regarding SecGen’s business using email addresses referencing “Kody Brand,” KBI, and Seven Bros; that the telephone number listed on invoices from Seven Bros and from Kody California was the same as Cathy’s number used in connection with all her email accounts; that Cathy sent SecGen an email in which she identified herself in the signature block as Production Controller for TVG, with the same telephone number that appears on invoices from Kody California and Seven Bros; that an employee referred to Cathy as the “boss” of TVG in an email; that Tai Nguyen sent an email (from a TVG email account) to SecGen, copying various employees at Seven Bros and TVG, asking that a payment be made to Kody California; that an employee of Seven Bros sent an email to SecGen (with a copy to Tai Nguyen at a TVG email account) giving instructions to SecGen to wire money to Seven Bros’ “domestic account,” but the wire information the employee gave was the wire information for Kody California; and that Tuong Ly (referred to as Steve Li) sent an email to SecGen from a TVG email account in which he identified himself as an employee in the accounting department of “Kody Branch [i.e., Kody California]/Seven Bros.”

In its separate statement of undisputed facts filed in support of its motion, SecGen set forth the facts related to (1) the vendor agreement

and Cathy's execution of it on behalf of "Kody Branch"; (2) the interrelatedness of Kody California, KBI, TVG, and Seven Bros, and Cathy's involvement with all of them; (3) the delays in delivery that occurred with respect to the goods ordered for the 2015 and 2016 seasons; (4) the amounts SecGen would be charged by its customers for late deliveries; and (5) the amounts owed under the liquidated damages provision, less offsets for charge-backs already taken.

2. Opposition to Motion for Summary Adjudication

Defendants filed a joint opposition to SecGen's motion.¹⁰ They argued that (1) the liquidated damages clause was void as an unenforceable forfeiture and penalty clause; (2) there was a disputed issue regarding defendants' set-off affirmative defense, which precluded summary adjudication; (3) SecGen failed to meet its burden to show that each of the non-contracting defendants was an alter ego of the contracting defendant; and (4) SecGen failed to provide discovery on its claimed damages or to provide any depositions.

Defendants submitted three declarations in support of their opposition. One declaration was from Minh Trinh (Minh), Tony's nephew. He stated that he was an independent contractor continuously employed with Kody California as a bookkeeper and staff accountant since 2014, and that his responsibilities included helping Tony maintain

¹⁰ SecGen's motion was filed on July 13, 2017, with a hearing scheduled for October 5, 2017. The opposition was filed on September 22, 2017, 13 days before the scheduled hearing. It was served by regular mail on September 21, 2017.

the company's books and corporate records. He declared that Kody California has "always maintained the necessary corporate documentation and filings as an active California corporation," maintains its own separate bank accounts, has never commingled any of its assets with any other entity, and is financially solvent. Minh also provided information regarding the orders for the 2015 and 2016 seasons.

The second declaration was from Diem Pham, an independent contractor employed with Seven Bros. He stated that he has been continuously employed as a bookkeeper with Seven Bros since 2013, and that his responsibilities include keeping the company's corporate records and bank statements. He declared that the accounting, financial, and corporate records are separately maintained for Seven Bros, that Seven Bros has always maintained the necessary corporate documentation and filings as an active California corporation, that Seven Bros maintained its own bank accounts, and that Seven Bros did not engage in any joint or shared accounting with any other entity, nor did it commingle its assets with any other entity. Finally, Pham stated that Seven Bros was financially solvent.

The final declaration was from Frederick H. Choi, an attorney who went to SecGen's facilities on August 14, 2017 on behalf of defendants to inspect the books and records that SecGen produced in response to defendants' document requests. Choi declared that he spent several hours examining the boxes of documents, and did not find the summaries or compilations filed by SecGen in support of their motion. He also declared that he was unable to locate any source documents or

business records concerning the damages SecGen alleged it suffered, nor could he find documents regarding the manner in which SecGen formulated or enforced its liquidated damages provision. Choi stated that SecGen had not produced for deposition any of their primary witnesses, and that defendants took the non-appearance for the deponents on September 20, 2017 (i.e., the day before the opposition to the motion was due).¹¹ Finally, Choi attached to his declaration an email from Michael to Cathy dated March 14, 2016 (after the instant lawsuit was filed), in which (according to Choi) Michael set forth SecGen's actual damages at approximately \$114,000. The email, which was printed out in such a manner that cut off portions of text, appears to be part of settlement negotiations.

In addition to the declarations, defendants submitted objections to SecGen's evidence (which the trial court did not consider because they did not comply with the Rules of Court) and their response to SecGen's separate statement. Out of the 88 facts that SecGen set out as undisputed, defendants purported to dispute 16 of them.¹² However, as to nine of those facts, defendants simply stated that they were disputed and did not cite to any evidence to support the claimed dispute. With regard to the seven purportedly disputed facts for which defendants cited evidence, four of them were disputed on the ground that there

¹¹ Choi did not disclose in his declaration what documents defendants had requested, or what depositions had been noticed and when they were noticed.

¹² As to many of the remaining facts, defendants simply asserted objections, such as lack of foundation or irrelevant, and did not state whether the fact was disputed. Because they failed to cite to any evidence giving rise to a dispute, we find those facts to be undisputed.

were no source documents to support SecGen’s facts; defendants supported this assertion with a citation to Choi’s declaration. Two of the remaining facts related to the amount of liquidated damages, which defendants purported to dispute by citing to the email Choi attached to his declaration—an email sent after the lawsuit was filed, whose text was partially obstructed, and which appeared to be part of settlement discussions. The final purportedly undisputed fact was related to SecGen’s performance under the contract, which defendants asserted was disputed by the “*Kody Decl.*”—a declaration that was not filed with their opposition to the motion.

3. *Ruling and Subsequent Events*

In its ruling on SecGen’s motion, the trial court noted at the outset that defendants’ opposition papers, which were filed 13 days before the date set for hearing, were not timely filed, and they were not properly served because they were served by ordinary mail 14 days before the date set for hearing. (Citing Code Civ. Proc., §§ 437c, subd. (b)(2), 1005, subd. (c).)¹³ The court noted that, despite its warnings, defendants repeatedly had improperly served opposition papers in the litigation,

¹³ Code of Civil Procedure section 437c, subdivision (b)(2) provides that papers in opposition to a motion for summary judgment or summary adjudication must be filed and served not less than 14 days preceding the date set for hearing. Code of Civil Procedure section 1005, subdivision (c) provides that opposition papers “shall be served by personal delivery, facsimile transmission, express mail, or other means . . . reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers . . . are filed.”

and that their failure to properly serve the opposition to the motion for summary adjudication prejudiced SecGen's ability to prepare a reply. The court noted it had discretion to refuse to consider the late-filed opposition papers and that it could grant the motion on that ground because SecGen met its burden on summary adjudication. Nevertheless, the court addressed defendants' opposition, and found that SecGen was entitled to summary adjudication of its breach of contract claim even considering defendants' evidence.

The court found it was undisputed that Kody California entered into a series of POs with SecGen containing a contractual provision that in the event of a late delivery of goods, SecGen could reduce the contract price by two percent per day or \$2,000, whichever was greater. The court also found that the fact that defendants were late in delivering a series of orders in both 2015 and 2016 was not properly disputed. The court then addressed the three issues that defendants raised in their opposition: the validity of the liquidated damages provision, the application of defendants' set-off defense, and alter ego issues.

With regard to the validity of liquidated damages, the trial court noted it was defendants' burden to rebut the statutory presumption that the liquidated damages provision is valid, and that defendants "have not made more than a cursory attempt to do so." The court rejected defendants' argument that SecGen's use of the formula of two percent per day of delay as liquidated damages was unreasonable because SecGen merely took that formula from its customer's contracts rather than engage in an analysis of its actual anticipated losses. The court found that SecGen's reliance on the formula used by its own

customers was appropriate, and that SecGen provided sufficient evidence to show that it engaged in a proper analysis regarding its losses in settling on that formula. The court also found that defendants' submission of the email attached to Choi's declaration was insufficient to create a triable issue of material fact regarding whether the liquidated damages provision was designed to substantially exceed the damages suffered; the court found that email was "likely inadmissible as a privileged settlement communication," and noted that, in any event, it related to only a small subset of the damages caused by the late shipments. Based on these findings, the court concluded that the liquidated damages provision was valid.

With regard to defendants' argument that their affirmative defense of set-off raised a triable issue of material fact as to the amount of damages, which they contended defeats summary adjudication, the court found that defendants failed to meet their burden. The court noted that the mere fact that an affirmative defense is asserted in the answer to the complaint is insufficient to avoid summary adjudication; instead, defendants were required to produce evidence to support that defense. Because defendants presented no such evidence, the court found that their affirmative defense did not give rise to a triable issue.

With regard to the alter ego issues, the court found that the evidence before it showed that defendants were engaged in a single enterprise, noting the "extensive evidence that Defendant [Cathy] Trinh and her family coordinated the running of the businesses together." The court found that defendants' evidence that Kody California and Seven Bros each maintain separate accounts and corporate

documentation, and that both are financially solvent was insufficient to raise a triable issue of fact as to whether defendants operated as a single enterprise and therefore were alter egos of one another.

Based upon its findings, the trial court granted summary adjudication of SecGen's breach of contract cause of action against defendants, jointly and severally, in the amount of \$2,082,983.36. Subsequently, the parties entered into a stipulation in which, among other things, SecGen agreed to dismiss its remaining causes of action and defendants agreed to accept a \$30,000 credit to resolve the causes of action asserted in their cross-complaint. SecGen also moved for, and was granted, prejudgment interest and attorney fees. Judgment in favor of SecGen and against defendants was entered, awarding SecGen \$2,082,983.36 in damages (less a \$30,000 offset for defendants), plus \$615,946.88 in prejudgment interest and \$752,383.78 in attorney fees. Defendants timely filed a notice of appeal from the judgment.

DISCUSSION

The entity defendants and Cathy filed separate opening briefs on appeal. Both briefs raise the same primary issues: whether the trial court erred in finding that the undisputed facts established that (1) the liquidated damages was valid and enforceable; and (2) defendants operated as a single enterprise and thus were alter egos of each other. The entity defendants raise two additional issues in their opening brief, which we address below in section C.

A. *Liquidated Damages Provision*

“[P]arties to a contract may agree in advance to liquidate their damages—to provide ahead of time that a certain sum of money is conclusively presumed to represent the amount of damage that will be caused by a specified breach of the contract.” (*Utility Consumers’ Action Network, Inc. v. AT&T Broadband of Southern Cal., Inc.* (2006) 135 Cal.App.4th 1023, 1028 (*Utility Consumers*).) Until 1978, liquidated damages provisions were presumptively void, unless it was shown that fixing the amount of actual damages was impracticable or extremely difficult, and that the amount selected represented a reasonable endeavor by the parties to estimate fair compensation for the loss sustained. (*Id.* at pp. 1028-1029.)

In 1977, the Legislature amended the law governing liquidated damages to provide that liquidated damages provisions were presumptively valid in all contracts except for contracts for the sale or lease of consumer goods and services, or in residential leases. (Civ. Code, § 1671; *Utility Consumers, supra*, 135 Cal.App.4th at p. 1028.) Thus, under subdivision (b) of amended Civil Code section 1671 (hereafter, section 1671(b)), a liquidated damages provision in a non-consumer contract is valid “unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.” (Civ. Code, § 1671, subd. (b).) For consumer contracts, Civil Code section 1671, subdivision (d) applies, and makes liquidated damages provisions in

such contracts presumptively void, as they were under the prior law. (*Utility Consumers, supra*, 135 Cal.App.4th at p. 1028.)

In *Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970 (*Ridgley*), the Supreme Court described the circumstances in which a liquidated damages clause in a non-consumer contract will be found to be invalid. The Court explained that such a clause “will generally be considered unreasonable, and hence unenforceable under section 1671(b), if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach. The amount set as liquidated damages ‘must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained.’ [Citation.] In the absence of such relationship, a contractual clause purporting to predetermine damages ‘must be construed as a penalty.’ [Citation.] . . . The characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform under a contract. . . . A contractual provision imposing a “penalty” is ineffective, and the wronged party can collect only the actual damages sustained.” (*Ridgley, supra*, 17 Cal.4th at p. 977.)

Both the entity defendants and Cathy contend that the liquidated damages provision at issue in this case was an invalid penalty provision because it bore no reasonable relationship to the actual damages SecGen suffered due to the late deliveries of goods. Their argument suffers from two fundamental faults.

First, their comparison between the liquidated damages and the actual damages SecGen ultimately suffered is not the correct

comparison. Section 1671(b), by its express language, “limits the circumstances that may be taken into account in the determination of reasonableness to those in existence “at the time the contract was made.” The validity of the liquidated damages provision depends upon its reasonableness at the time the contract was made and not as it appears in retrospect. Accordingly, the amount of damages actually suffered has no bearing on the validity of the liquidated damages provision.” (*El Centro Mall, LLC v. Payless ShoeSource, Inc.* (2009) 174 Cal.App.4th 58, 63 (*El Centro*).) Thus, assuming that the amount of the charge-back SecGen assessed against defendants in April 2015 (\$365,548.64) and/or the amount set forth in the email attached to Choi’s declaration (approximately \$114,000) constituted evidence of the total amount of damages SecGen actually suffered from the delays in deliveries—an assumption that is far from certain—that evidence would be insufficient to create a triable issue as to the validity of the liquidated damages provision.¹⁴

Second, defendants ignore that, as the parties challenging the validity of the liquidated damages provision, they bore the burden to present evidence sufficient to raise a triable issue regarding whether the amount of liquidated damages set forth in the vendor agreement

¹⁴ The party opposing a motion for summary adjudication bears the burden to produce evidence sufficient to raise a triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Ibid.*)

represented “the result of a reasonable endeavor . . . to estimate a fair average compensation for any loss that may be sustained.” (*Ridgley, supra*, 17 Cal.4th at p. 977; see also *El Centro, supra*, 174 Cal.App.4th at p. 63 [“In the cases where subdivision (b) applies, the burden of proof on the issue of reasonableness is on the party seeking to invalidate the liquidated damages provision”].) Defendants presented no such evidence in opposition to the summary adjudication motion.¹⁵ Instead, the undisputed evidence before the trial court was that, at the time the contracts (i.e., the POs) were entered into, SecGen was subject to contracts with its customers that imposed on SecGen discounts ranging from one to two percent per day that delivery of goods were delayed. In addition, Michael stated in his declaration that delays in delivery of goods to SecGen’s customers not only result in losses to SecGen from discounts imposed by its customers, but they also cause damage to SecGen’s reputation for reliability, and often results in reduced future orders from its customers or cancellation of accounts. In light of this undisputed evidence, the trial court properly concluded that defendants failed to raise a triable issue of fact supporting their assertion that SecGen did not engage in a reasonable analysis to determine its likely losses in the event of a breach. Accordingly, the court did not err in finding that the liquidated damages provision was valid.

¹⁵ We note that at oral argument counsel for the entity defendants argued that SecGen did not meet its burden on its summary judgment motion because it was required in the first instance to establish that it made a reasonable endeavor to estimate its anticipated losses in the event of a late delivery. Counsel is mistaken. Under section 1671(b) a liquidated damages provision is *presumptively valid*. Thus, SecGen had no obligation to establish the provision’s reasonableness.

B. *Single Enterprise/Alter Ego*

As noted, the trial court found that all defendants were jointly and severally liable for the liquidated damages in this case even though Cathy signed the vendor agreement on behalf of “Kody Brand” and all of the POs at issue were issued to “Kody Brand, Inc.,” because the undisputed evidence showed that defendants were engaged in a single enterprise and thus were alter egos of each other. The entity defendants and Cathy contend on appeal that the trial court erred in finding defendants were all alter egos of each other because there was no showing that there would be an inequitable result if the corporate form were not disregarded. In addition, Cathy contends there were triable issues of fact regarding whether there was a unity of interest and ownership between Cathy and the entity defendants because there was no evidence that Cathy was a principal of or had any ownership interest in any of the entity defendants. We address each contention in turn.

1. *Showing of Inequity*

“Ordinarily, a corporation is regarded as a legal entity separate and distinct from its stockholders, officers and directors [or other corporations]. Under the alter ego doctrine, however, where a corporation is used by an individual or individuals, or by another corporation, to perpetrate fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the corporation’s acts as if they were done by

the persons actually controlling the corporation. [Citations.]”
(*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 993.)

“There is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case. There are, nevertheless, two general requirements: ‘(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.’ [Citation.] And ‘only a difference in wording is used in stating the same concept where the entity sought to be held liable is another corporation instead of an individual.’ [Citation.]” (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) ““A very numerous and growing class of cases wherein the corporate entity is disregarded is that wherein it is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of another corporation.”” (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249 (*Las Palmas*)). In such instances, courts apply the single enterprise theory of alter ego liability.

Under the single enterprise theory, ““[i]n effect what happens is that the court, for sufficient reason, has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it. The court thus has constructed for purposes of imposing liability an entity unknown to any secretary of state comprising assets and liabilities of two or more legal

personalities; endowed that entity with the assets of both, and charged it with the liabilities of one or both.”” (*Las Palmas, supra*, 235 Cal.App.3d at pp. 1249-1250.)

In the present case, there was, as the trial court put it, a “veritable mountain of evidence”—all of it undisputed—that Cathy and the entity defendants conducted business with SecGen as a single enterprise, with each entity interchangeable for another within the enterprise. The fact that defendants may have done so without any intent to deceive does not mean that there was no showing of an inequitable result if the entity defendants and Cathy were treated as separate entities. “An inequitable result does not require a wrongful intent.” (*Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2013) 222 Cal.App.4th 811, 813.)

Although, as the entity defendants note in their appellants’ opening brief, the trial court did not directly address the inequitable result element of its alter ego determination, the undisputed facts support the court’s implied finding that defendants must be treated as a single enterprise to avoid an inequitable result. Those facts show that Cathy solicited business from SecGen and signed the vendor agreement on behalf of “Kody Brand” at a time when she knew the Trinh family had decided to dissolve KBI. For several years after KBI was dissolved, Cathy continued to solicit business on behalf of “Kody Brand” and, at her direction, SecGen issued POs to “Kody Brand, Inc.,” unaware that KBI had been dissolved. Kody California, Seven Bros, and TVG conducted themselves as parties to those POs (with Cathy as their principal), sending invoices to and receiving payments from SecGen. In

light of this evidence the trial court properly found, albeit impliedly, that it would be inequitable to allow them to now escape their obligations under those POs and the vendor agreement.

2. *Cathy's Argument*

In her appellant's opening brief, Cathy argues for the first time that the court's finding that she was an alter ego of the entity defendants was in error because there was no evidence that Cathy was a principal of or had any ownership interest in any of the entity defendants. We reject this argument because it is a new theory on appeal that is contrary to positions she took in the trial court.

“A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing party.’ [Citation.] The principles of ‘theory of the trial’ apply to motions [citation], including summary judgment motions. [Citation.]” (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29.)

In this case, Cathy held herself out as “a principal of certain of the entity . . . defendants” in a declaration she signed under penalty of perjury that was submitted in opposition to a motion for sanctions a month before the summary adjudication motion was heard. More importantly, in the memorandum of points and authorities in opposition to the motion for summary adjudication filed on behalf of *all* defendants, including Cathy, Cathy was twice described as a shareholder of Kody California.

Given these statements made to the trial court, it would unfair to that court, and manifestly unjust to SecGen, for us to allow her to raise a new argument on appeal that contradicts those statements. Therefore, we decline to consider it.

C. *The Entity Defendants' Remaining Arguments*

The entity defendants make two additional arguments on appeal. First, they argue that neither Kody California, TVG, Seven Bros, nor Cathy are bound by the liquidated damages provision because Cathy signed the vendor agreement on behalf of KBI. Second, they argue that the trial court's finding that defendants operated as a single enterprise was based upon impermissible evidence (an order denying the entity defendants' application for a writ of attachment) and an erroneous legal theory (SecGen's argument that because KBI was dissolved when the vendor agreement was signed, Cathy could not have signed on behalf of it and had to have signed on behalf of Kody California). Neither argument has merit.

The first argument is both wrong on the facts and ultimately irrelevant. The fact is that Cathy signed the vendor agreement on behalf of "Kody Brand," not "Kody Brand, Inc." It is undisputed that "Kody Brand" is the dba for Kody California. Thus, it is unclear whether she signed on behalf of the soon-to-be-dissolved KBI or Kody California. But it does not matter which entity actually signed the agreement. "A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural, i.e., to

disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice.” (*Hennessey’s Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1359.)

Thus, it does not matter which corporation actually signed the vendor agreement; all are liable as alter egos.

The second argument, which is made in two parts, misconstrues or ignores the facts and also is ultimately irrelevant.

In the first part of their argument, the entity defendants contend that the trial court improperly allowed SecGen to present as evidence a ruling by Judge Amy Hogue on an application for writ of attachment filed by Kody California, in which Judge Hogue found that KBI and Kody California “operated as ‘one enterprise’ in receiving and fulfilling [SecGen’s] orders,” and that the liquidated damages provision was not an impermissible penalty under Civil Code section 1671. The entity defendants contend admission of this evidence was contrary to Code of Civil Procedure section 484.100, which provides that the determinations made in connection with an application for a writ of attachment may not be given in evidence nor referred to at the trial of the underlying action. They also contend that Judge Hogue’s findings affected the trial court’s decision-making. Although the entity defendants are correct that the trial court granted SecGen’s request to take judicial notice of Judge Hogue’s ruling, and that the submission of that ruling by SecGen appears to be improper under Code of Civil Procedure section 484.100, the trial court’s ruling on the motion for summary adjudication makes

clear that the court did not rely upon that ruling in any way, and instead made its findings based entirely upon properly admitted, undisputed evidence.

The second part of the entity defendants’ argument—i.e., that the trial court based its ruling on SecGen’s purportedly false argument that the vendor agreement had to have been signed on behalf of Kody California because KBI was dissolved—ignores that defendants *did not dispute* that “[o]n or about March 12, 2008, SecGen and Kody Brand (the d/b/a of Kody Branch of California, Inc.) entered into a written contract [identified as the vendor agreement].” Thus, it is irrelevant that SecGen stated in its memorandum of points and authorities in support of its motion that the reason Cathy signed on behalf of Kody California was because KBI was dissolved. Moreover, as discussed in connection with the entity defendants’ first argument, it does not matter which entity signed the agreement in light of the trial court’s finding that defendants operated as a single enterprise and therefore were liable as alter egos.

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DISPOSITION

The judgment is affirmed. SecGen shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.